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RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SMALL v. SMALL.

In Pennsylvania, a wife may not sue her husband, directly and in her own name, for money received by him from her separate estate.

The Married Persons' Property Act of 1887, gives to a wife, in her own name, those rights of action only, which are necessarily incident to her rights of ownership of property and capacity to contract as if she were a *feme sole*.

Error to the Court of Common Pleas of Franklin County.

Assumpsit by Lavinia Small against David W. Small, her husband, in which action judgment was rendered against the husband, and he appealed.

The power of the wife to bring such a suit in her own name, depended upon—

An Act relating to husband and wife, defining the rights to and power over their property, to make conveyances and contracts, authorizing them to sue, and be sued, upon their contracts, and for torts, and defining the interest of husband and wife in the estate of each, by will or otherwise.

SECTION 1. *Be it enacted, etc.*, That hereafter, marriage shall not be held to impose any disability on, or incapacity in, a married woman, as to the acquisition, ownership, possession, control, use, or disposition of property of any kind, in any trade or business in which she may engage, or for necessities, and for the use, enjoyment, and improvement of her separate estate, real and personal, or her right and power to make contracts of any kind, and to give obligations binding herself therefor; but every married woman shall have the same right to acquire, hold, possess, improve, control, use, or dispose of her property, real and personal, in possession or expectancy, in the same manner as if she were a *feme sole*, without the intervention of any trustee, and with all the rights and liabilities incident thereto, except as herein provided, as if she were not married; and property of every kind, owned, acquired, or earned by a woman, before or during her marriage, shall belong to her, and not to her husband, or his creditors: *Provided, however*, That a married woman shall have no power to mortgage, or convey her real estate, unless her husband join in such mortgage, or conveyance.

SECTION 2. A married woman shall be capable of entering into, and rendering herself liable upon any contract, relating to any trade, or business, in which she may engage, or for necessities, and for the use, enjoyment, and improvement of her separate estate, and for suing and being sued, either upon such contracts, or for torts done to or committed by her, in all respects as if she were a *feme sole*, and her husband need not be joined with her, as plaintiff, or defendant, or be made a party to any action, suit, or legal proceeding of any kind, brought by, or against, her, in her individual right, and any debt, damages, or costs, recovered by her in any such action, suit, or proceeding, shall be her separate property, and any debt, damages, or costs, recovered against her in any such action, suit, or other proceeding, shall be payable out of her separate property, and not otherwise: *Provided*,

however, That nothing in this, or the preceding section, shall enable a married woman to become accommodation endorser, guarantor, or surety, for another.

SECTION 3. A married woman may make, execute, and deliver leases of her property, real and personal, and assignments, transfers, and sales of her separate personal property, and notes, bills, drafts, bonds, or obligations of any kind, and appoint attorneys to act for her, and it shall not be necessary for her husband to be made a party thereto, or joined therein.

SECTION 4. Husband and wife shall have the same civil remedies upon contracts in their own name and right, against all persons for the protection and recovery of their separate property, as unmarried persons.

SECTION 5. A married woman may dispose of her property, real and personal, by last will and testament, in writing, signed by her, or manifested by her mark or cross, made by her at the end thereof, in the same manner as if she were unmarried.

SECTION 6. This Act shall be known as "The Married Persons' Property Act."

SECTION 7. All acts inconsistent herewith, are hereby repealed. [Approved, June 3, 1887: P. L. 332.]

F. M. Kimmel and *W. R. Gillan*, for David W. Small.

Alexander Stewart and *O. C. Bowers*, for Lavinia Small.

MITCHELL, J., October 7, 1889. The single question presented is whether the Act of June 3, 1887 (P. L. 332), known as the "Married Persons' Property Act," authorizes a wife to sue her husband, directly, and in her own name, for money received by him from her separate estate.

Section four of the Act reads: [*vide supra*.] This language is general and unlimited. It makes no exception of an action against each other, and, taken by itself, its natural meaning is, perhaps, broad enough to include them without straining. But no rule of judicial interpretation is wiser or better settled than that which prohibits the taking of a single sentence, even though it forms a separate section of a statute, and construing it apart from the context, or without regard to the subject matter, and the general purpose sought to be accomplished. The present Act gives notable warning of the danger of such a course. Though not long, it is extremely intricate, and confused, if not contradictory. The first two sections make the same general grant at least four times, and each time with such variations that, though the general purpose is clear, very difficult questions may be raised as to the exact limits of the powers conferred.

Section three then proceeds to grant certain specific powers,

all of which, except for the doubt raised by this section itself, are clearly conferred by parts of the language of the preceding sections. It is a striking example of what is not infrequent in legislation, and the avoidance of which, I may say in passing, is by no means the least difficult of judicial accomplishments, the desire to enforce and emphasize the intention, leading to a second expression, which tends to becloud the first. Next is the fourth section, with which we are immediately concerned. Like the preceding section, it seems to be the product of a desire to emphasize a grant already abundantly implied in the control over property, "with all the rights and liabilities incident thereto," of the first section, and expressly given in the capacity to sue and be sued, provided by the second. Can it be fairly construed to mean more than this?

The general purpose of the Act is clear enough. It is to give married women the same freedom of ownership, control, and disposition of their property and earnings, and the rights and remedies incident thereto, that men have over theirs. It accordingly confers upon them the absolute power of disposition of their personal property, but requires the joining of the husband in mortgage or conveyance of real estate. The rights of action, conferred by implication, in section one, as already said, or expressly, in the latter sections, are given as means of maintaining the rights of property conferred by the sections themselves, and there is nowhere any indication of a purpose to extend them beyond their character, as a necessary incident for that purpose. Still less is there any indication of a purpose to extend the rights or powers of the husband, which a right to sue the wife, under the construction of section four contended for, would certainly do.

If we look not only at the general intent of the Act, but more closely at the language used, we are led to the same result. The purpose is not only expressed broadly, in apt language, once, but is repeated and reiterated with superabundant caution. In this varied and detailed consideration, it is impossible to suppose that so important a branch of the subject, as the right of action between husband and wife should not have been thought of, or being thought of, should not

have been granted in unequivocal terms, if intended to be granted at all. To legislators versed in the principles of the common law, it would immediately suggest itself as a distinct and momentous departure from the legal policy of centuries, which ordinary phraseology, however general, would not commonly be understood to intend, and it is inconceivable that, under such circumstances, it should be granted obscurely and by implication. As said by WOODWARD, J., in *Ritter v. Ritter* (1858), 31 Pa. 398—

“If the Legislature meant that such actions as the present should be sustained, they had command of a very copious language in which to express their will.”

The Acts of April 11, 1856 (P. L. 315), and June 11, 1879 (P. L. 126), make provisions for actions by the wife against the husband in case of desertion, or neglect, or refusal to support, and we conclude that the Legislature thought this remedy ample, without extending it to suits between parties living amicably together in the marital relation.

This view is confirmed almost to a demonstration by the legislative history of the Act of 1887. The fourth section follows closely the English Married Women's Property Act of 1882 (45 and 46 Vict., c 75; Law Rep. Stat. 1882, p. 458), and, as originally introduced into the Senate, it provided, as that Act does, that—

“Husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, including each other,” etc. (Legislative Record, 1887, p. 896)

This specific provision, which put the change in the previous law into that precise, definite, and unquestionable form which its importance demanded, was struck out, and the section passed without it. The inference from this action is irresistible, that the Legislature did not intend that actions between husband and wife, while living together, should be authorized.

It is argued that as the language is the same with respect to both husband and wife, it must authorize both or neither to sue the other; and, therefore, if it does not authorize the husband to sue the wife, we shall have the absurd result that the Legislature has solemnly conferred upon a married man the same right to sue strangers that an unmarried man possesses.

This is not without plausibility, and, if the section stood alone, would be of much force; but taken in its connection, it is an additional link in the argument that the husband's rights, except as involved in the regulation of his wife's, were not intended to be affected at all. The same may be said of the phrase "their separate property" in the same section. What is a husband's separate property? In language of the law, such a phrase is as absurd as the result pictured in the argument referred to. In truth the real explanation of both phrases, entirely unsuitable as they stand, is the failure to notice the effect of striking out the words "including each other," contained in the Act as originally introduced. With these words left in, the absurdity, as to suits by the husband, disappears, and the phrase "separate property," though not elegant as to legal style, is clear and definite in its meaning. There are several other changes, from the first draft, to the Act, as finally passed,—such as the striking out of section three, of the power to convey real estate without the husband joining, and the attaching of a proviso to the contrary to section one, etc.,—which indicate that the Act, as originally introduced, was much more radical in its changes than the Legislature was willing to pass; and we think it clear that the authority to sue each other, was one of the proposed changes which were refused a sanction.

One further consideration which may be adverted to, is the hardship and injustice which might arise as to past matters, by the grant of a universal and unrestricted right to sue upon a claim which the defendant may have had no reason to expect or foresee. The present case affords a striking example of these dangers. Of course, I do not speak of the moral merits of the case, for of these I know nothing, but of the legal possibilities. The husband received this money about 1856. There is no claim that he received it against the wife's will, nor any evidence that it was not used for their mutual benefit in the support of the family. Thirty years after it had been thus spent, presumably with her entire approval, a difference or quarrel occurs, and the wife sues to recover the money. No promise to pay is proved or pretended. The plaintiff rests on the presumption that her husband received

it as trustee for her, and, as her counsel truly say, "the burden is upon him to prove the contrary." Yet the very same Legislature that is claimed to have put this action and its consequent burden upon him, in a most ably drafted and elaborately considered statute on the competency of witnesses, expressly denied him the right of testifying that the money was given to him by her, or that he spent it at her direction. This of course, is a legislative rather than a judicial argument, but it adds force to the considerations which induce the Court to say now, as it has said with marked emphasis heretofore, that so great a change in the policy of the law upon a subject that may come home to every household in the Commonwealth, should not rest on inference, or implication from general words, but should appear by the explicit and unquestionable mandate of the Legislature; and when the change is made, if at all, it should be done in such form as to guard against the possibilities of injustice in regard to past transactions, such as are suggested in the present case.

Judgment reversed.

By the Married Women's Property Act of 1882 (45 and 46 Vic., c. 75), every "contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind, her separate property, unless the contrary be shown."

By Section twelve, it is enacted, that "Every woman shall have, in her own name, against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*."

In *Butler v. Butler* (1885), L. R. 14 Q. B. D. 831, an action was brought by a husband against his wife, to recover £1,848 out of her separate estate, for money paid in her behalf.

WILLS, J. "Now, I take it to be clear that with respect to the wife's separate estate, free from restraint upon anticipation, she is competent to contract, and to contract with her own hus-

band. It is a remarkable instance of legislation by judicial decision, whereby the old common law has been entirely abrogated and the power of the wife to contract with her husband, has been established, and upon a contract of loan, the wife may sue the husband."

Therefore this case rules that a husband may maintain his action against his wife, and may charge her separate property for money lent by him to her after marriage, and for money paid by him for her after marriage at her request; but he is not entitled, since the above Act, to maintain an action against her for money lent to her, or money paid to her, at her request, before marriage. This ruling was sustained on appeal (1885), L. R. 16 Q. B. D. 374, in learned opinions by the Master of the Rolls (Lord Esher), and Mr. Justice COTTON.

In *Countz v. Markling* (1875), 30 Ark. 17, a judgment confessed by a

husband in favor of his wife was held to be void and was quashed on *certiorari*.

[The Civil Code of Arkansas (§ 42 and Act April 28, 1873, §§ 4, 8, 9; Dig. 1884, p. 975) provides, that, "Where a married woman is a party, her husband must be joined with her, except in the following cases: *First*. She may be sued alone, upon contracts made by her, in respect to her sole and separate property, or in respect of any trade, or business, carried on by her, under any statute of this State. *Second*. She may maintain an action in her own name, for, or on account of, her sole or separate estate, or property, or for damages against any person, or body corporate, for any injury to her person, character, or property. *Third*. Where the action is between herself and her husband, she may sue, and be sued, alone."

[In *Alabama*, under Statute Feb. 28, 1887, § 7 (Code, p. 526, § 2347), "The wife must sue alone, at law or in equity, upon all contracts made by or with her, or for the recovery of her separate property, or for injuries to such property, or for its rents, income, or profits, or for all injuries to her person or reputation; and upon all contracts made by her, or engagements into which she enters, and for all torts committed by her, she must be sued as if she were *sole*."

[In *Arizona*, by Rev.Stat. 1887, p. 169, § 683, "When a married woman is a party, her husband shall be joined with her, except that—1. Where the action concerns her separate property, she may sue, or be sued, alone. 2. When the action is between herself and her husband, she may sue, or be sued, alone."

And by the same Rev. Stat. 1887, p. 373, § 2104 (Act Feb. 28, 1887), "Hereafter, married women of the age of twenty-one years and upwards shall have the same legal rights as men of the age of twenty-one years and upwards, except the right of suffrage and of hold-

ing office, and except the right to make contracts binding the common property of the husband and wife; and shall be subject to the same legal liabilities as men of the age of twenty-one years and upwards, but no part of this section shall be so construed as to prevent women from voting at school elections, or hold office as school trustees, as now provided by law."

[In *California*, the provisions of the Civil Code are to the same effect as those of *Arizona* (Code of Civil Procedure, 1885, p. 110, § 370)—"When a married woman is a party, her husband must be joined with her, except: 1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. 2. When the action is between herself and her husband, she may sue and be sued alone. 3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing, entered into between them, she may sue and be sued alone."

[*Wilson v. Wilson* (1868), 36 Cal. 447, was an action by a married woman against her husband, for the recovery of two promissory notes executed before their marriage. The right of action was sustained under the section cited above, SAWYER, C. J. (now U.S. Circuit Judge), saying: "There is no limitation as to the kind of actions that may be maintained 'between herself and her husband;' and section 395, as amended in 1865-6 [§ 1881 of the Civil Code, p. 621], authorizes the husband and wife to testify on their own behalf, or on behalf of each other, as witnesses in actions between themselves, *except in actions of divorce*. This provision contemplates that there may be actions between husband and wife, other than those relating to divorces. What are they, unless relating to rights of property? Disputes with respect to property may arise between them when the separate existence

of the wife, and a separate right of property is recognized at law, as in this State, as well as other matters; and when they do arise, there is as great necessity for a judicial determination of the questions, as when they arise between other parties. A litigation of the kind between husband and wife may be unseemly and abhorrent to our ideas of propriety, but a litigation in one form can be no more so than in another, and no more so than the necessity itself which gives rise to the litigation. The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence, and rights at law, as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced. The right to bring actions is accordingly recognized in the sections referred to, and no limitation is imposed as to the character of the actions:" pp. 446-7.

[Conversely, the husband successfully required his wife to reconvey his real estate, which he had conveyed to her in lieu of making a devise, on her promise to reconvey at his request: *Brison v. Brison* (1888), 75 Cal. 525.

[Another point in *Wilson v. Wilson*, was equally interesting. The ordinary period of limitation had expired before the wife began her action. The Statute of Limitations of 1850, as amended in 1863 (Code Civ. Procedure p. 102, § 352), provides, that: "If a person entitled to bring an action mentioned in Chapter III, of this title [*i.e.*, other than for the recovery of real property, though the provision in regard to realty is to the same effect: *Id.* p. 94 § 328], be, at the time the cause of action accrued, either: 4. A married woman, and her husband be a necessary

party with her in commencing such action; The time of such disability is not a part of the time limited for the commencement of the action." The words in italics were added by the amendatory act, and § 370 (*supra*) being permissive in allowing the wife to sue alone, (*Corcoran v. Doll* (1867), 32 Cal. 83, 90), the running of the statute would have been suspended but for the words added in 1863: *Wilson v. Wilson* (1868), 36 Cal. 447, 451.

[In Colorado, by the Civil Code of 1887 (chap. 1, § 6)—"A married woman may sue, and be sued in all matters, the same as if she were *sole*." The Gen. Stat. 1883 (p. 695, § 2268), had restricted the power to cases, "in all matters having relation to her property, person, or reputation," but § 2279 was identical with the provisions of the Civil Code, *supra*. Section 2271 of the Gen. Stat. 1883 also provided—"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account, and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued, as if *sole*, in regard to her trade, business, labor, services, and earnings, and her property acquired by trade, business, services, and the proceeds thereof, may be taken on any execution against her."

[Colorado Limitation Act also provides (Gen. Stat., p. 673, § 2177)—"If any person, entitled to bring any of the actions before mentioned in this Act [*i.e.*, personal actions, and bills founded upon fraud or trust], shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person may bring the said actions within the time in this chapter respectively

limited. after the disability shall be removed."

In Connecticut, Gen. Stat. 1888 (p. 234) provide—"§ 986. When a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same, as if she were unmarried." In *Rockwell v. Clark* (1877), 44 Conn. 534, this word "may" was particularly observed, and the husband was not allowed to sue, as "trustee," upon his wife's trade contracts. "It confers a right to sue, which did not exist before; not in addition to the right of the [husband, under § 2792, as] trustee, but in exclusion of it; and that it is a statute for simplification:" PARDEE, J., Id. 536.

In *Adams v. Adams* (1883), 51 Conn. 135, suit was brought to set aside conveyances of real estate by a woman who had been abandoned by her husband. The Gen. Stat. (1888, § 2794) provided that "When any man shall have abandoned his wife, he shall be deemed to have abandoned his right to the custody and control of her property and the rents and income thereof; and said property shall thereupon immediately vest in her and be her sole estate, and she may, during the continuance of such abandonment, sue and be sued, and transact business in her own name, as a *feme sole*." The Court held she could bring such a suit, under the statute, against her husband.

[*Spitz's Appeal* (1888), 56 Conn. 184, arose after the passage of the Act of 1877 (Gen. Stat. 1888, p. 610), which provides—"§ 2796. In case of marriages on or after April 20, 1877, neither husband nor wife shall acquire, by force of the marriage, any right to or interest in any property held by the other before, or acquired after, such marriage, except as to the share of the survivor in the property, as provided by law. The separate earnings of the wife shall be her sole property. She shall have power

to make contracts with third persons, and to convey to them her real and personal estate, as if unmarried. Her property shall be liable to be taken for her debts, except when exempt from execution, but in no case shall be liable to be taken for the debts of her husband. And the husband shall not be liable for her debts contracted before marriage, nor upon her contracts made after marriage, except as provided in the succeeding section." The marriage occurred in January, 1878, and the wife loaned large sums to her husband, upon his promise to repay with interest. The husband afterward failed and made an assignment in insolvency and the wife was both allowed to claim a dividend and to establish her claim by her own oath. The statute was admittedly silent, "but no intention to impair her prior right to enter into such contracts, is implied by such silence. The statute was not designed to abridge any rights of property which the wife had before its enactment, but, on the contrary, its object was to invest her with the complete ownership and control of the property which she had when married, or might thereafter acquire:" BEARDSLEY, J., p. 186.

[The Gen. Stat. Conn. (p. 611), also provide—"§ 2798. In case of marriages existing prior to April 20, 1877, the provisions of the two preceding sections shall apply, whenever any husband and wife have entered, or shall hereafter enter, during marriage, into a written contract with each other for the mutual abandonment of all rights of either in the property of the other, under prior statutes, or at common law and for the acceptance instead thereof of the rights in said sections provided, which contract shall be recorded in the Court of Probate of the district, and in the town clerk's office of the town in which they reside. And thereupon, said provisions shall apply to such marriage."

[In Dakota, under Gen. Stat. 1887, c. 98, Sec. 1 (Compiled L. 1887, p. 554) —“ § 2600. From and after the passage of this Act, woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity, for redress and protection, that her husband has to appeal in his own name alone; *provided*, this Act shall not confer upon the wife the right to vote or hold office, except as otherwise provided by law.”]

[The right of suits between married persons is expressly recognized in chap. 211 (Compiled L. 1887)—“ § 5260. No person offered as a witness in any action, or special proceeding, in any court, or before any officer, or person having authority to examine witnesses, or hear evidence, shall be excluded, or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is a husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed, or defended, except as hereinafter provided: 1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage, or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action, or proceeding, by one against the other, nor to a criminal action, or proceeding for a crime committed by one against the other.”]

[By “ § 4873. When a married woman is a party, her appearance, the prosecution or defense of the action, and the joinder with her, of any other person or party, must be governed by the same rules as if she were single.” Id. p. 828.

[The Delaware Act of April 9, 1873 (chap. 550, vol. 14, Laws; Rev. Stat. 1874, p. 479), makes all of her property and wages her sole and separate estate, and provides—“ SEC. 4. That any married woman may prosecute and defend suits at law, or in equity, for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband, but he alone cannot maintain an action, representing his wife's property; and it shall be lawful for any married woman to make any and all manner of contracts necessary to be made with respect to her own property, and suits may be maintained on such contracts, as though the party making them was a *feme sole*.”]

[Florida, by Act of March 6, 1845 (Digest, p. 755), makes the wife's property “separate and independent,” but “in the care and management of her husband,” and then provides—“ SEC. 5. Any married woman having separate and independent title to property, under and by virtue of Sections 3 and 4 of this chapter, shall not be entitled to sue her husband for the rent, hire, issues, proceeds, or profits of said property, nor shall the husband charge for his management and care of the property of the wife.”]

In Georgia, by § 1774, Code of 1882, p. 408—“A married woman may sue and be sued, without joining her husband in the action, in any of the courts of this State, in the following cases: 1st, when the action concerns her separate property; 2d, when the action is between herself and husband; 3d, when she is living separate and apart from her husband. In no case shall she be re-

quired to prosecute, or defend, by a guardian or next friend."

[In Idaho, by Rev. Stat. 1887, p. 441—§ 4093. When a married woman is a party [to a civil action], her husband must be joined with her: except—1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone: 2. When the action is between herself and her husband, she may sue and be sued alone: 3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.

[In case of an action for the recovery of real property, where her husband is a necessary party, the wife has five years after discoverture, to commence her action, before the bar of the statute will apply, as provided in California, *supra*, p. 755.

In *Chestnut v. Chestnut* (1875), 77 Ill. 346, it was held that a proceeding by *sci. fa.*, commenced by a wife against her husband, upon a supposed record of an order for the payment of temporary alimony, could not be sustained, as there was no statute in the State abrogating the common law in this respect.

["An Act to revise the law in relation to husband and wife," approved March 30, 1874 (R. S. p. 576), provides—"§ 10. Should either husband, or wife, unlawfully obtain, or retain, possession, or control, of property belonging to the other, either before, or after, marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner, and to the same extent, as if they were unmarried."

[Commenting upon this statute, HIGBEE, P. J. (*Larison v. Larison* (1881), 9 Bradw. (Ill.) 27, 31), said—"It is a well settled rule of law, that where a new remedy is given by statute, it does not

take away the existing remedy, unless the statute expressly so provides; and it is insisted by defendant in error that, as the remedy for an injury to the property of a married woman by her husband, was in equity at common law, this section is to be treated as cumulative, and as giving a new remedy without taking away the old. Had the rights of the parties remained the same as they were at common law, such would have been the correct construction of this section; but this statute does more than give a new remedy—it changes the entire rights of the parties, it removes the disability of marriage, and creates the wife a *feme sole* for the purpose of acquiring, managing, and disposing of property; and of contracting and being contracted with; confers upon her the legal title to her property, recognizes her separate existence, and gives her a legal standing in the courts of law, which she did not before possess, and these new rights must be enforced in a court of law, the same as if she were a *feme sole*. * * * * * Her right to the property is a naked, legal right, and a court of law is fully adequate to its protection. Under such circumstances, the use and enjoyment of the property between husband and wife, while residing together as such, is not the proper subject for the interference of a court of chancery, unless to prevent irreparable injury." A bill filed by the wife was accordingly dismissed.

["An Act in regard to Evidence and Depositions in Civil Cases," approved March 29, 1872 (Laws of 1871-2, p. 405), as amended by an Act approved January 21, 1874 (Laws of 1873-4, p. 98, § i)—"No husband, or wife, shall, by virtue of Section One of this Act, be rendered competent to testify for, or against, each other, as to any transaction, or conversation, occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in

cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong, or injury, done by one to the other, or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except, also, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be insured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this Act: *Provided*, that nothing in this section contained, shall be construed to authorize, or permit, any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits and causes between such husband and wife."

[In *Thomas v. Mueller* (1883), 106 Ill. 41, WALKER, J., in delivering the opinion of the Court, said: "As to the management and control of her property, the wife is almost entirely emancipated from all power of the husband. She may buy and sell property, and sue and be sued in reference to it, independent of his control, and the eighth section, in terms, limits their power to sue each other for compensation for labor performed or services rendered for the other, whether in the management of property or otherwise. From this it is manifest that the Legislature intended to remove all restrictions on their power to contract with each other, and to en-

able them to sue each other on such contracts, in the same manner as if they were not married." The Court sustained a judgment confessed to the wife by the husband, and dismissed a creditor's bill which had been filed for the setting aside of the confessed judgment as an obstruction to the collection of the creditor's debt due from the husband.

[Indiana Rev. Stat. 1888 (vol. 1, ch. 2), provide that—"§ 254. A married woman may sue alone: *First*. When the action concerns her separate property. *Second*. When the action is between herself and her husband; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years."

[And by "§ 296. Any person, being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed." This section was defined by the Code of Civil Procedure (Rev. Stat. 1876, vol. 2, p. 313), thus—"§ 797. In the construction of this Act, the following rules shall be observed, when consistent with the context: * * * the phrase 'under legal disabilities,' includes married women, * * ." Under this section, *Bauman v. Grubbs* (1866), 26 Ind. 419, and *Harlen v. Watson* (1878), 63 Id. 143, were decided. But the Civil Code of 1881 (Rev. Stat. 1888, § 1285), in re-enacting this section, omitted the words "married women," as was done in California: *v. p. 755, supra*.

[*Harrell v. Harrell* was a case decided in the Supreme Court of Indiana, January 24, 1889, in which the husband sued his wife to recover money loaned, ELLIOTT, C. J., saying: "There is no reason why she may not borrow money from her husband, to enable her to conduct her separate business, and prevent the sacrifice of her property. If she does voluntarily borrow from him under

an express contract, and there is neither fraud nor oppression, nor any injustice, no valid reason exists why she should not be compelled to pay him, for he is her creditor. The relationship between the parties does, however, exert an important influence upon the contracts of the wife. It is doubtless incumbent on the husband to show an express contract, and its consideration, as well as good faith and voluntary action. We very much doubt whether he could recover without alleging and proving the express contract, and its consideration, in any case. Certainly he could not recover money placed in the hands of his wife, without showing the purpose for which she obtained it, and an express promise to repay it. * * * Where there is full consideration yielded by the husband, entire good faith, an express contract, and the money is received by the wife for the benefit of her separate estate, and to prevent injury to that estate, or loss to the wife, the courts cannot do otherwise than uphold the claim of which the contract forms the element."

[*Crater v. Crater* (decided April 27, 1889), in the same State, was an action by the wife against her husband, in the court below, to recover the possession of land. As a contract made in 1866, by a married woman, to give her husband half her land, to be held by them as joint tenants, in consideration of his agreement to discharge a lien thereon, was void, the Court held that such a contract, and the performance thereof on the husband's part, were no defence to ejectment by the wife. COFFEY, J., said: "It is settled law in this State, that the wife may sue the husband in relation to her separate property: *Wilkins v. Miller* (1857), 9 Ind. 100; *Scott v. Scott* (1859), 13 Id. 225. * * * In New York, under statutes very similar to our own, it was held that the wife might maintain an action of eject-

ment against her husband for her separate real estate: *Wood v. Wood* (1881), 83 N. Y. 575. It is our opinion that the wife, in this State, may maintain an action of ejectment against her husband to recover the possession of her separate real estate."

[The Revised Code of Iowa (1888) provides that—"§ 2562. A married woman may, in all cases, sue and be sued, without joining her husband with her, to the same extent as if she were unmarried, and an attachment, or judgment, in such action shall be entered by, or against, her as if she were a single woman."

[And by "§ 3641. Neither husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other; or in a civil action or proceeding one against the other, but they may in all civil and criminal cases be witnesses for each other."

In *Peters v. Peters* (1875), 42 Iowa 182, an action was brought by the wife against her husband, for damages on account of batteries and assaults. But the right of action was denied by the Supreme Court. The sections of the code mainly relied upon by the defence were—

§ 2211. "A wife may receive the wages of her personal labor, and maintain an action therefor, in her own name, and hold the same in her own right; and she may prosecute and defend all actions, at law or in equity, for the preservation and protection of her rights and property, as if unmarried."

§ 2204. "Should either the husband, or wife, obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

The argument, as ingenious as it was

fallacious, tried to express that if the wife could sue the husband for her property, the right of the wife to sue the husband for a tort exists, for that right was property; therefore the wife might maintain an action against the husband for a tort.

In *Johnson v. Barnes* (1886), 69 Iowa 641, a husband abandoned his wife and child; the wife maintained the child and brought an action against the husband to recover, for such expenses, but SEEVERS, J., said: "The Code, § 2214, provides that 'the expenses of the family, and the education of the children, are chargeable upon the property of both the husband and wife, or either of them, and, in relation thereto, they may be sued jointly, or separately.' We do not think such inquiries can, or should be, entered into, but that, under the statute, both parents are bound to contribute to the support of the children, and that when one does so, a promise to pay, in favor of one and against the other, cannot be implied."

[In Kansas (Comp. Laws, 1885, ch. 62, p. 536), by "§ 3349. A woman, while married, may sue and be sued, in the same manner as if she were unmarried." And (Id. ch. 80, p. 609) by "§ 3822. A married woman may sue and be sued in the same manner as if she were unmarried."

[The Kentucky Act relating to Practice in Civil Cases (ed. 1888, p. 33) provides that—"§ 34. In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property in which he refuses to unite, she may sue or be sued alone."

[By Gen. Stat. Ky. (chap. 71, Art. 1, 1887, p. 885)—"§ 2. If, at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming

through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

[And by (chap. 71, Art. II., p. 888) "§ 1. No action at law, or in equity, shall be brought, under or by virtue of an adverse, interfering entry, survey, or patent, to recover the title or possession of land from an occupant, where he, or the person under whom he claims, has a connected title thereto, in law or equity, deducible of record from the commonwealth, and has, or shall have had, an actual occupancy of the same by settlement thereon, under such title, for seven years before the commencement of the action; and such possession of land shall bar and toll the right of entry into such land by any person, under an adverse title or claim, and such possession as will bar the right to recover the same, shall vest the title in the occupant or vendee. This limitation shall not apply to a person who is an infant, a married woman of unsound mind, or out of the United States in the employment of the United States, or of this State, at the time the cause of action accrued, nor until seven years after the removal of such disability; but the disability of one of several claimants shall save only his own right, and not that of another."

[In Louisiana (Rev. Civil Code 1889, ch. 5, Art. 121, p. 65), "The wife cannot appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband."

[And (Art. 124, p. 65), "If the husband refuses to empower his wife to appear in court, the judge may give such authority."

[And (Art. 132, p. 67), "If the husband is under interdiction [*i.e.*, declared to be in an habitual state of imbecility, insanity, or madness: Id. Art. 389], or absent, the judge may, when satisfied of

the fact, authorize the wife to sue or be sued, or to make contracts."

[And also (Art. 123, p. 65), "The woman separated from bed and board, has no need, in any case, of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains."

[In *Hawthorne v. Clark* (1887), 39 La. An. 678, William Clark conveyed certain immovable property to Mary Quirk, and a few weeks later, married her. The parties subsequently separated, and Clark made a simulated title to his son-in-law. The suit was dismissed, and the dismissal was affirmed, TODD, J., saying: "During the existence of the marriage, Clark could bring no suit against his wife, to have the sale annulled."

In *Abbott v. Abbott* (1877), 67 Me. 304, an action was brought by a wife, after divorce, against her husband, for an assault committed during coverture. PETERS, J. "Can an action of tort for such an injury, instituted after divorce, be sustained by her against her former husband? It cannot be maintained. The theory upon which the present action is sought to be maintained, is that coverture merely suspends the remedy of the wife against her husband. The doctrine advocated finds no support from any of the principles of the common law. By the earliest edicts of the courts, he had a right to strike her as a punishment for her misconduct, and her only remedy was that 'she hath retaliation to beat him again if she dare.' Chancellor KENT lays down the doctrine, not contradicted, or challenged in any of the editions of his Commentaries, that 'as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him considerable and reasonable superiority and control over her person, and he may even put gentle restraints

upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce': 2 Kent Comm. 180. For many years a gradual evolution of the law has been going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American States, that the husband has no right to strike his wife, or to punish her, under any circumstances or provocation whatever. * * * We believe a rule which forbids all such opportunities for law suits and speculations to be wise and salutary and to stand on the solid foundations of the law. * * * She has the privilege of the writ of *habeas corpus*, if unlawfully restrained; as a last resort, she can prosecute a suit for divorce."

The same ruling was made in *Philips v. Barnett* (1870), L. R. 1 Q. B. D. 436; *Longendyke v. Longendyke* (1863), 44 Barb. (N. Y.) 366; *Schultz v. Schultz* (1882), 63 How. (Id.) 181, affirmed on appeal in 27 Hun. (Id.) 26 (1882), but reversed in the Court of Appeals (1882), 89 N. Y. 644.

In *Hobbs v. Hobbs* (1879), 70 Me. 381, an action of assumpsit was brought by a wife against her husband, upon an account annexed. APPLETON, C. J., said: "The question presented is, whether either party to the marriage contract can sue the other while the marriage relation subsists. By the Act of 1876, c. 112 (Rev. Stat. 1883, p. 524), 'She may prosecute and defend suits at law or in equity, either of tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights, or for the redress of her injuries, as if unmarried, or may do it jointly with her husband, and the husband shall not settle or discharge any such action, or cause of action, without the written consent of the wife.'

Under previous decisions of this Court, it has been held that neither husband or wife can sue the other directly in assumpsit."

In *Crowther v. Crowther* (1868), 55 Me. 358, the Court held that this statute was not intended to give such a right. The wife could not maintain an action against her husband during the existence of the marriage relation.

[The wife not being allowed to sue the husband, the period of limitation is extended, by Rev. Stat. Maine (ed. 1883, p. 688, chap. 81,) "§ 88. If a person entitled to bring any of the aforesaid [*i.e.* personal] actions, is a minor, or married woman, insane, imprisoned, or without the limits of the United States, when the cause of action accrues, the action may be brought within the times limited herein, after the disability is removed." And also by (p. 824, chap. 105,) "7. When such right of entry, or action, first accrues, if the person entitled thereto is a minor, married woman, insane, imprisoned, or absent from the United States, he, or any one claiming under him, may make the entry, or bring the action, at any time within ten years after such disability is removed, notwithstanding twenty years have expired."

[After the dissolution of the marriage by divorce, the objection to the maintenance of an action at common law, arising from the marital relation, no longer exists, and it is not necessary to resort to equity, the action may be maintained at common law: *Blake v. Blake* (1874), 64 Me. 177; *Webster v. Webster* (1870,) 58 Id. 139.

[In Maryland (Pub. Gen. Laws, 1888, vol. 1, Art. 45, Sec. 4, p. 802.) "A married woman having no trustee, may, by her next friend, sue in a court of law or equity, in all cases for the recovery, or security, or protection of her property, as fully as if she were a *feme sole*.

[And (Id. 7,) "Any married woman, who by her skill, industry, or personal labor, shall earn any money, or other property, real, personal or mixed, shall hold the same, and the fruits, increase and profits thereof, to her sole and separate use, with power as a *feme sole*, to invest, re-invest, devise, bequeath, sell and dispose of the same; provided, that such money, or property, shall be liable for the payment of any claim, or debt, incurred by such married woman, in and about the business, occupation or enterprise in which said money or other property shall be earned or invested; and for any such debt, said married woman may be sued before any justice of the peace, or court of this State (whichever shall have jurisdiction, as determined by the amount of said debt) as if she were a *f. me sole*; and any such property may be taken in execution to satisfy any judgment rendered on such cause of action; provided, that the husband of such married woman shall have the right to appear and defend any such suit in her name; and no judgment shall be entered in any such suit against such married woman without proof, unless by the joint consent, in writing, of herself and husband; provided further, that any married woman may sue in any court of law or equity in this State, upon any cause of action, in her own name, and without the necessity of a *prochein ami*, as if she were *feme sole*."

In *Edwards v. Stevens* (1862), 3 Allen (Mass.) 315, it was decided that a married woman could not bring an action against parties of whom her husband was one, to recover compensation for services under Gen. Stat., C. 108. The decision was on the ground that while the statute authorized her to "carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation

to her separate property, business, trade, services, labor and earnings, in the same manner as if she were sole," yet in order to make a valid contract with her husband, he should also have the power to contract as if he were sole, which was nowhere given him. HOAR, J., called attention to *Lord v. Parker* (1861), at p. 127 in the same report, where it was settled "that a married woman cannot form a copartnership in business with her husband, for the reason, among others, that the true construction of the statutes [of 1855, C. 304, §§ 3 and 7 (of which § 3 became § 3 of C. 108 of Gen. Stat.) and of 1857, C. 249, § 2,] which authorize her to carry on business upon her sole and separate account, do not confer upon her the power to make a contract with her husband. That case is decisive of the present. These statutes are in derogation of the common law, and are not to be extended by implication": Id. p. 315. To the same effect: *Bowker v. Bradford* (1886), 140 Mass. 521.

[The Pub. Stat. (ed. 1882, ch. 147, p. 819,) afterwards specifically provided—"SEC. 2. A married woman may make contracts, oral and written, sealed and unsealed in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts with her husband." And, by—"SEC. 7. A married woman may sue and be sued, in the same manner as if she were sole, but this section shall not be construed to authorize suits between husband and wife."

[And now it must be considered as established that a wife cannot enforce a note held by her, against her husband, even if originally made to a third person and endorsed to her. "As a promise to pay, the note is no longer valid:" C. ALLEN, J., *Wilson v. Bryant* (1883), 134 Mass. 291, 300. This, of course, is during coverture, as upon divorce, there

is no further disability: *Chapin v. Chapin* (1883), 135 Id. 393.

[Michigan (Howell's Ann. Stat., ed. 1883, p. 1638,) provides—"§ 6297. Actions may be brought by and against a married woman, in relation to her sole property, in the same manner as if she were unmarried, and in cases where the property of the husband cannot be sold, mortgaged or otherwise encumbered, without the consent of the wife, to be given in the manner prescribed by law, or when his property is exempted by law, from sale on execution, or other final process, issued from any court, against him, his wife may bring an action in her own name, with the like effect as in cases of actions in relation to her sole property, as aforesaid."

[And (p. 1635) by "§ 6295. That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner, and with like effect, as if she were unmarried." This section was originally enacted as Section one of the Statute of February 13, 1855, alluded to in the next case.

In *Jenne v. Marble* (1877), 37 Mich. 319, a man leased certain farms to his wife, and sold her certain animals. The lease contained clauses of eviction. The wife's contract to pay was executory, and she bound herself by her personal covenant. And CAMPBELL, J., ruled that such a contract could not be enforced by the husband's assignee, in an action at common law. "If we hold that the contract before us is valid, we

must do so on the ground that husbands and wives can contract with each other, just as freely as strangers can, and may sue each other just as freely, at law or in equity. No ground short of this can maintain this action. We think the statutes have not gone far enough to allow this, and that, so far as husbands and wives are concerned, they cannot contract with each other in any larger sense than they could formerly in equity, except that their contracts, when valid, may be enforced at law, where legal in form. Unless impliedly repealed, there can be no question as to the disability, under the whole code of statutes prior to the law of 1855, and the language of that statute is no broader than the equitable rule concerning separate property, laid down in the same words, in most of the old decisions:" *Id.* 325.

In *White v. White* (1885), 58 Mich. 546, it was decided that a wife might maintain an action of replevin against her husband, living apart from her, for her individual property, after making due demand therefor. And see *Carney v. Gleissner* (1885), 62 Wis. 493, in which such an action was sustained under § 2345 R. S. of Wisconsin.

In *Moore v. Foote* (1876), 34 Mich. 443, a wife held a lawful claim against a firm of which her husband was a member, and it was decided that she was not precluded from recovering upon it because of any incidental wrong that might result to one of the members of the firm.

[Hence, in *Benson v. Morgan* (1883), 50 Mich. 77, a married woman, in suing a firm of which her husband is a partner, must implead him as defendant, if the partners are not severally liable, in order to maintain her action. Here the wife was employed, with her husband's consent, by a firm in which he was interested, and which had full knowledge of her claims against them for her la-

bor; and she was not bound by any settlement therefor, made between her husband and the firm, without her authority.

[The competency of husband and wife as witnesses against each other, is now fixed by a statute, approved June 17, 1885 (Pub. Acts, p. 287), amending Howell's Ann. Stat. § 7546, by inserting the words in brackets,—“A husband shall not be examined as a witness, for or against his wife, without her consent; nor a wife, for or against her husband, without his consent, (except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support, within the meaning of Act No. 336 of the session laws of 1883, and) except in cases where the husband or wife shall be a party to the record, in a suit, action, or proceeding where the title to the separate property of the husband or wife, so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife, so called or offered as a witness, shall be the subject matter in controversy or litigation, in such suit, action, or proceeding, in opposition to the claim or interest of the other of said married persons, who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under, or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other, during the marriage; but in

any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."

[Minnesota. (Rev. Stat. 1878, ch. 66, p. 710,)—"§ 29. A married woman may sue or be sued as if unmarried, and without joining her husband, in all cases where the husband would not be a necessary party aside from the marriage relation." Of course, the wife appears alone in actions between her husband and herself: *FLANDRAU, J. Wolf v. Banning* (1859), 3 Minn. 202, 206.

[The Rev. Stat. also provide (Ch. 73, Tit. 1, p. 792, as amended by Ch. 72, Gen. L. 1889, p. 186, by adding the words in italics,)—"§ 10. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. *Nor to proceedings supplementary to execution.*

[Mississippi, (Rev. Code, ed. 1880, p. 339,) enacts—"§ 1167. The Common Law, as to the disabilities of married women, and its effects on the rights of property of the wife, is totally abrogated, and marriage shall not be held to impose any disability or incapacity on a woman, as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts, and do all acts in reference to property, which she could lawfully do, if she was not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real

and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she was not married."

["§ 1168. Husband and wife may sue each other."

[As early as 1838, on an appeal from Chancery, the High Court of Errors and Appeals said: "The first objection to the proceedings below is, that the appellant, being a *feme covert*, exhibited her bill alone, against her husband. No doubt the wife was under a legal incapacity to bring a suit alone against her husband, and should have prosecuted her claim through the intervention of a *prochein ami*; yet when the incapacity appeared upon the face of the bill, as in the present case, the defendant must take advantage of it by demurrer: Coop. Eq. Plead. 163. [1 Dan. Chan. Pldg. * 556.] The defendant having answered, the objection comes too late. It was urged by counsel, that the right of demurrer having been reserved in the answer, it was competent for them to make any defence that could have been made under a demurrer filed. We have found no authority to sustain this position; and we deem it a direct violation of the well-settled rule, which precludes a party from demurring and answering to the same part, or the whole of a bill:]" PRAY, J., *Kenley v. Kenley* (1838), 2 How. (Miss.) 751, 753.

[By Miss. Rev. Code (ed. 1880, p. 447)—"§ 1601. Husband and wife may be introduced by each other, as witnesses in all cases, civil and criminal."

[In Missouri (Rev. Stat., ed. 1879, p. 592, chap. 59, Art. I.), by "§ 3468. When a married woman is a party, her husband must be joined with her in all actions, except those in which the husband is a sole plaintiff and the wife a sole defendant, or the wife a plaintiff and the husband a defendant, and in all

such actions, it shall be lawful for the wife to sue, or defend, by her agent or attorney, as she may think proper, and in all actions by husband and wife, or against husband and wife, they may prosecute the same by attorney; or they, or either, may defend by attorney; and it shall not be necessary for the wife, in any such case, to sue with her husband, by next friend, or to appear and defend by next friend."

[And the husband has, during the coverture, the right of possession of the wife's real estate, unless (by § 3292) he give cause for the proper Circuit Court to intervene, as shown in *Deguvin v. St. Jos. Lead Co.* (1889), U. S. Circ. Ct. E. Dist. Mo., 37 Fed. Repr. 663, and *Dyer v. Wittler* (1886), 89 Mo. 81, the wife's power to sue him would ordinarily relate to her personalty, in respect to which the Rev. Stat. (ed. 1879, p. 560, chap. 51,) provide—"§ 3296. Any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her separate control, and shall not be liable to be taken by any process of law, for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express consent of his wife: provided, that said personal property shall not be deemed to have been reduced to possession, by the husband, by his use, occupancy, care or protection thereof; but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the hus-

band, to sell, incumber, or otherwise dispose of the same, for his own use and benefit; but such property shall be subject to execution for the payments of the debts of the wife, contracted before marriage, and for any debt, or liability, of her husband, created for necessities for the wife or family: and [added by amendatory Act of March 16, 1883, Laws, p. 113,] any such married woman may, in her own name, and without joining her husband as a party plaintiff, institute and maintain any action, in any of the courts of this State, having jurisdiction, for the recovery of any such personal property, including rights of action, as aforesaid, with the same force and effect as if such married woman was a *feme sole*; provided, any judgment for costs, in any such proceedings, rendered against any such married woman, may be satisfied out of any separate property of such married woman, subject to execution."

[Montana provides (by § 7 of Act of March 3, 1887; Comp. Stat. 1888, p. 61)—"SEC. 7. A married woman may sue and be sued, in the same manner as if she were *sole*."

[And (by § 1 of Act of March 3, 1887; Comp. Stat. 1888, p. 1045)—"SEC. 1439. That, from and after the passage of this Act, woman shall retain the same legal existence and legal personality after marriage, as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law, or equity, for redress and protection, that her husband has to appeal in his own name alone: *Provided*, This Act shall not confer upon the wife a right to vote, or hold office, except as is otherwise provided by law."

[Nebraska (Act of June 1, 1871; Laws 1875, p. 88; Comp. Stat. ed. 1885, p. 423, ch. 53) provides—"SEC. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried." In *May v. May* (1879), 9 Neb. 16, an action by a wife against her husband, on two promissory notes, was sustained. One note had been made to a third person and assigned to the wife; and both had been made during coverture. "This capacity to sue is not limited, and no person, or class of persons, is excepted from its effect. If she were unmarried, there could be no doubt that she could sue this same man. This statute (as I understand it) plainly provides that she can do the same thing, though married to him:" COBB, J., p. 25.

[This statute "has wholly removed the common law disability of a married woman:" GANTT, J., *Pope v. Hooper* (1877), 6 Neb. 178, 187.

[Nevada (Act of March 10, 1873, p. 193, § 25; Gen. Stat. 1885, p. 147) permits—"Sec. 523. When the wife is living separate and apart from her husband, she may sue, and be sued, alone."

And (by § 7 of Act of March 8, 1869, p. 196; Gen. Stat. 1885, p. 756)—"SEC. 3029. When a married woman is a party, her husband shall be joined with her, except that: First. When the action concerns her separate property, she may sue alone. Second. When the action is between herself and her husband, she may sue, or be sued, alone."

[By the Code of Civil Procedure, as amended by Statute of 1881 (Gen. Stat. 1885, p. 833)—"SEC. 3403. A husband cannot be examined as a witness for, or against, his wife, without her consent, nor a wife, for, or against, her husband, without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But

this exception shall not apply to an action, or proceeding, by one against the other."

[And by Act of November 21, 1861 (Gen. Stat. 1885, p. 878)—"SEC. 3642. If a person entitled to commence any action for the recovery of real property, or to make an entry, or defense, founded on the title to real property, or to rents, or services, out of the same, be, at the time such title shall first descend, or accrue, either: first, within the age of twenty-one years; or, second, insane; or, third, imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or, fourth, a married woman: SEC. 3643. The time during which such disability shall continue, shall not be deemed any portion of the time in this Act limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense, made after that period."

[And by the same (p. 880)—"SEC. 3652. If a person entitled to bring an action other than for the recovery of real property, except for a penalty, or forfeiture, or against a sheriff, or other officer, for an escape, be, at the time the cause of action accrued, either: first, within the age of twenty-one years; or, second, insane; or, third, imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or, fourth, a married woman; the time of such disability shall not be a part of the time limited for the commencement of the action."

[New Hampshire (Gen. Laws 1878, p. 435, ch. 183) enacts that—"SECT. 12.

Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done before marriage, as if she were unmarried; *provided, however*, that the authority hereby given to make contracts, shall not affect the laws heretofore in force as to contracts between husband and wife; *and provided also*, that no contract, or conveyance, by a married woman, of property held by her, in her own right, as surety or guarantor for her husband, nor any undertaking by her for him, or in his behalf, shall be binding on her."

[And by the same chapter—"SECT. 13. Nothing in this chapter shall be construed to empower any husband to convey any of his property to his wife, in any other manner, or with any other effect, than if the same had not been passed."

[As was said, in effect, in *Houston v. Clark* (1871), 50 N. H. 482, the statute unquestionably removes all disabilities of the wife so far as regards her separate property, and gives her the same rights and remedies with respect thereto, as though she were *sole*. The logical result seems to be, that the status of marriage interposes no obstacle in the way of either party maintaining a suit at law against the other in respect to those contracts which the wife is empowered to make; for a contract, in form, is no contract, in any legal sense, unless the law, while recognizing it as valid, furnishes a remedy for its enforcement. Such right of action was, indeed, unequivocally recognized in *Cleremont Bank v. Clark* (1865), 46 N. H. 134; for, if a judgment may be had against the wife as trustee of her husband, it must be for the reason that she has in

her hands, money, etc., of her husband, for which he himself would have been entitled to judgment, had he, instead of his creditors, brought the suit; and the decision is clearly put upon that ground. If then, the defendant owed a debt to his wife, which he was legally bound to pay, there was no reason why he might not use these notes [which were made by a third party to him, as payee, and by him indorsed to his wife in repayment of a loan,] for that purpose, as well as any other property, or money, which belonged to him, and the title thereto would pass to her, unless section 14 [Sect. 13, *supra*] is to have the construction claimed for it by the plaintiffs' counsel. * * * But I think this was intended to guard against voluntary conveyances for the purpose of defrauding creditors, and that it cannot be held to prohibit the transfer of title in property or money, from husband to wife, for the purpose of paying an honest debt." LADD, J., *Clough v. Russell* (1875), 55 N. H. 279, 281.

[The same judge made these remarks, which might well have been made, in the principal case: "The plaintiffs' counsel deprecate this wide departure from the doctrine and practice of the common law. Fortunately, the policy, or impolicy of the law, is not a matter we are to consider. We are to declare our judgment of its meaning and application, and if a mistake is made in ascertaining the legislative intent, the legislature is always at hand to correct it." Id. 281.

[And by Gen. Laws (ed. 1878, p. 531, ch. 228)—"SECT. 20. A husband and wife are competent witnesses for, or against, each other, whether joined as parties, or not, in all cases, both civil and criminal. SECT. 21. The preceding section shall not be so construed as to render competent the testimony of a husband, or wife, for, or against each other, as to any statement,

conversation, letter, or other communication made by either of them to the other, or to any other person; nor as to other matters, when it appears to the court that the examination of either, as a witness, in relation thereto, would lead to a violation of marital confidence."

[By the same (p. 510, ch. 221)—"SECT. 2. If the person first entitled to bring such action [that is, for the recovery of real estate] is an infant, a married woman, or insane, at the time the right accrues, the action may be brought within five years after such disability is removed."

[And by the same (p. 571, ch. 221)—"SECT. 7. Any infant, married woman, or insane person, may bring any personal actions within two years after such disability is removed.

[New Jersey provides (Revision of 1871, ed. 1877, p. 850)—"15. Every person of full age and sound memory may appear and prosecute, or defend, any action in any of the courts of this State, in person, or by his solicitor in chancery, or attorney-at-law."

[And (Id. 637)—"5. That any married woman shall, after the passing of this Act, have the right to bind herself by contract, in the same manner and to the same extent, as though she were unmarried, and which contracts shall be legal and obligatory, and may be enforced at law or in equity, by or against such married woman, in her own name, apart from her husband; *provided*, that nothing herein shall enable such married woman to become an accommodation endorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt, or answer for the default, or liability, of any other person."

[And (Id. 638)—"11. That a married woman may maintain an action in her own name, and without joining her husband therein, for all breaches of contract, and for recovery of all debts, wages,

earnings, money and all property, both real and personal, which by this Act is declared to be her separate property, and for all damages done thereto, and she shall have, in her own name, the same remedies for the recovery and protection of such property as if she were an unmarried woman; and in any civil or criminal proceedings, it shall be sufficient to allege such property to be her property."

[And (Id. 598)—"24. Thirty years actual possession of any lands, tenements, or other real estate, uninterruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor general's office of the division in which such location was made, or in the secretary's office, agreeably to law, or wherever such possession was obtained by a fair *bona fide* purchase of such lands, tenements, or other real estate, of any person or persons whatever, in possession, and supposed to have a legal right and title thereto, or of the agent, or agents, of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate; *provided always*, that if any person or persons having a right or title to lands, tenements, or other real estate, shall, at the time of said right or title first descended or accrued, be within the age of twenty-one years, *feme covert*, *non compos*, imprisoned, or without the United States of America, then such person or persons, and his and their heir and heirs, may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons, or his or their heirs, commence or sue forth his or their

action within five years after his or their full age, discoverture, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no time after; *and provided also*, that any citizen or citizens of this, or any other of the United States, and his or their heirs, having right or title to any lands, tenements, or other real estate within this State, may, notwithstanding the aforesaid times are expired, commence his or their action for such lands, tenements, or other real estate, at any time within five years next after the passing of this Act, and not afterwards."

[*Yeomans v. Petty, Adm'r, etc.*, decided in the Court of Chancery of New Jersey, October term, 1885, was a case where the wife brought suit against her husband's administrator to recover monies received by the husband as an advancement for the wife and as part of her separate estate, used and applied by the husband in improving his own farm, and also for money loaned by the wife to the husband, the defence being the Statute of Limitations. BIRD, V. C., said: "Until the Statute of Limitations is expressly extended to such cases, I cannot think it wise for the Court to hold that, because the husband or wife, who has a claim against the other, does not bring suit therefor, or within the statutory period, it shall be barred. The policy of the law is to prevent litigation between husband and wife."

[In *Chavez v. McKnight* (1857), 1 N. Mex. 150, the right of the wife to sue her husband was sustained under the civil law, BROCCCHUS, J., saying: "According to the civil law, a woman, on marrying, parts with many of her civil rights, and amongst the rights alienated by the conjugal association, is that of appearing generally in court, as plaintiff, or defendant, alone, or without the consent of her husband. But she does not part with the right of prosecuting suits against her husband when

causes of action against him arise," citing *Eseriche Mujer Casada*, 451. * * * "Such are the well-established principles of the civil law. Although a wife is thereby prohibited from entering alone, into litigation with other persons, without the consent of her husband, she is not prohibited from instituting and maintaining suits against him whenever she may have a legal or equitable cause of action."

[Subsequently an Act was passed (April 2, 1884, chap. 14; Comp. Laws 1884, p. 540), which provides—"§ 1087. All property, real, personal, and mixed, and choses in action, owned by any married woman, or owned or held by any woman at the time of her marriage, shall continue to be her separate property, notwithstanding such marriage; and any married woman may, during coverture, receive, take, hold, use, and enjoy property of any and every description, and all avails of her industry, free from any liability of her husband, on account of his debts, as fully as if she were unmarried." And by §§ 1880 and 1881 (p. 910), a wife has three years after discoverture, to bring actions at law or in equity, for any lands; and by § 1869 (p. 906), one year, in other cases.

In *Freethy v. Freethy* (1865), 42 Barb. (N. Y.) 641, an action was brought by the plaintiff, against her husband, to recover damages for slander. The words charged were clearly actionable, and the only question was the right of the wife to sue her husband under the Statute of 1862, § 3, which provided that "any married woman might bring and maintain an action, in her own name, for damages, against any person, or body corporate, for any injury to her person, or character, the same as if she were sole." The plaintiff was nonsuited. FOSTER, J.: "if the Legislature had intended to include such suits, it would have used language clearly denoting

such intention. * * * When the Legislature intends to make such a striking innovation of the rules of common law, and so much opposed to public policy, and the peace and happiness of the conjugal relation, as would be the case if husband and wife were permitted to sue each other, it should use such language as will make it clearly manifest."

[By the New York Code of Civil Procedure—"§ 450. In an action, or special proceeding, a married woman appears, prosecutes, or defends, alone, or joined with other parties, as if she was single. It is not necessary, or proper, to join her husband with her, as a party, in any action, or special proceeding, affecting her separate property." (The last sentence was added in 1879.) This section is substantially the same as § 7, chap. 90, Laws of 1860, as amended by § 3, chap. 172, Laws of 1862, which were both repealed by § 1, chap. 245, Laws of 1880, leaving the Code of Civil Procedure in force.

[In *Whitney v. Whitney* (1867), 49 Barb. (N. Y.) 319, a wife sued her husband to recover a sum of money which he took from under her pillow, while she was asleep. The Court ruled that a common law action would lie.

[The power of a wife to sue her husband was discussed by ADAMS, J. (*Alward v. Alward*, Supreme Ct. N. Y., Special Term, Cayuga County, June, 1888), and a "legal" action, with trial by jury, denied. The case was then proceeded in as a suit in equity, and a decree made in favor of the husband for money expended, at the request of the wife, in the management of her separate estate.

[The learned judge pointed out the conflict of decisions in New York State, in the absence of a decision of the Court of Appeals, fairly made, upon the precise question, and unhampered by other complications. "In the case of *Wright v. Wright* (1873), 54 N. Y. 437, the

commission of appeals held that a wife might maintain an action against her husband, upon a promissory note, and that it mattered not in what form she brought her action. In *Wood v. Wood* (188?), 83 N. Y. 575, it was held that a wife might maintain ejectment against her husband." This case expressly followed *Wright v. Wright*: to the same effect, *Minier v. Minier* (1870), 4 Lans (N. Y.) 421, decided under § 3, chap. 172, Laws of 1862, amending § 7, chap. 90, Laws of 1860.

[In *Howland v. Howland* (1880), 20 Hun (N. Y.) 472, it was held that she might likewise maintain replevin; in *Berdell v. Parkhurst* (1879), 19 Id. 350; s. c. 58 How. (N. Y.) 102, that the husband might sue his wife for conversion." In the former of these two cases BOARDMAN, J., said that "the weight of authority, and the reason of the married woman's law, sustain her right," citing *Wright v. Wright*, *supra*; *Perkins v. Perkins* (1872), 62 Barb. (N. Y.) 531; *Whitney v. Whitney*, *supra*; *Adams v. Curtis* (1870), 4 Lans. (N. Y.) 164. But *Perkins v. Perkins* denied that a husband could maintain an action at law, against his wife, to recover for services rendered, POTTER, J., explaining that "Interpreting these statutes (including that of 1862), to be *in pari materia*, as if all were contained in one Act, beginning with those of 1848 and 1849, entitled 'for the more effectual protection of the property of married women;' taking the common law as it has ever been declared; abrogating none of the common law, by forced construction, not expressed by a statute; and giving due force to the maxim, *expressio unius est exclusio alterius*, husbands are excluded from their provisions:" Id. 542.

[*Granger v. Granger* (1886), 2 N. Y. St. Rep. 211, was action by a husband against his wife, upon a promissory note given by her to her husband, for

the benefit of her separate estate: the action was held to be maintainable as the parties might contract with each other.

[ADAMS, J., *Alward v. Alward*, *supra*, "At first blush, these citations would seem to be conclusive upon the question under consideration. A careful examination convinces me, however, that so far as it relates to this precise question, what is said in the first two cases, [*Wright v. Wright* and *Wood v. Wood*,] is *obiter*; while the remainder are overruled, in principle at least, by some more recent decisions of the Court of Appeals. The general term in the first department, in the case of *Schultz v. Schultz* (1882), 27 Hun (N.Y.) 26, held that a married woman might sue her husband, in a civil action, for assault and battery. This decision, which is in direct conflict with those of *Freethy v. Freethy* (1865), 42 Barb. (N. Y.) 641, and *Longendike v. Longendike* (1863), 44 Id. 366, was placed upon the ground that the Acts of 1848, 1849, 1860 and 1862 had not only destroyed the unity of husband and wife, but had expressly conferred upon them, the right to sue each other in any form of action. On appeal to the Court of Appeals, the case was reversed (89 N. Y. 644); and although no opinion was written, the ground upon which the reversal was granted, is made quite obvious by the reference thereto which appears in the celebrated case of *Bertles v. Nunan* (1883), 92 N. Y. 160," where husband and wife were held to take by entirety, on a conveyance of land to them, notwithstanding this legislation. In this case, EARL, J., reviewed this legislation, and concluded that the common law incidents of marriage were swept away only by express enactments. "The ability of the wife to make contracts, is limited. Her general engagements are absolutely void, and she can bind herself by contract, only as she is expressly

authorized to do so by statute. A husband still has his common law right of tenancy by the curtesy. Although section seven of the Act of 1860, authorizes a married woman to maintain an action against any person, for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury; and so it was held, notwithstanding the Acts of 1848, 1849 and 1860, that the common law disability of husband and wife, growing out of their unity of person, to convey to each other still existed:" 92 N. Y. 160. And *Bertles v. Nunan*, was affirmed in *Zornlein v. Bram* (1885), 100 N. Y. 13.

["Neither the Act of 1848, nor that of 1849, contains any provision relating to the bringing of suit by married women. Obviously, the extent to which the Legislature designed to invade the common law rule by these Acts, was simply to confer upon married women the right to take, hold and convey their separate estate, in the same manner as though unmarried. By the Act of 1860, as thereafter amended by section seven, chapter 172, Laws of 1862, the additional right and liability to 'sue and be sued, in all matters relating to her sole and separate property, * * * in the same manner as if she were sole,' was conferred upon her. It is noticeable that this language of this section is substantially the same as that of section three of the Act of 1849, which permits a married woman to bargain, sell, and convey her real estate in the same manner, and with like effect, as if she were unmarried; and yet the Court of Appeals held, in *White v. Wager* (1862), 25 N. Y. 328, that this language did not enable her to convey directly to her husband; and this decision has been acquiesced in, down to within a year past, when it was abrogated by express enactment: Laws 1887, c. 537. It would seem, therefore, that if it required

specific action on the part of the Legislature, to enable husband and wife to convey directly to each other, it would require similar action to authorize them to sue each other. Careful investigation, however, discloses no such intention on the part of the law-making power. * * *

I am not unmindful of the contention frequently heard, that the innovations which our modern civilization has made upon the conservatism of remoter generations, respecting the marital relations, are so radical in their character as to render it improper, if not impossible, to stop short of complete revolution; and such does, indeed, appear to be the tendency of recent legislation. I think, however, that I can perceive, upon the part of the court of last resort, a disposition to throw the responsibility for the new order of things, solely upon the law-making power, and, at the same time, to place a check upon this tendency, by adopting and adhering to rigid rules of construction." ADAMS, J., *Atward v. Atward*, *supra*.

[North Carolina Code of Civil Procedure (chap. 10, Code of 1883, p. 67), provides—"SEC. 178. When a married woman is a party, her husband must be joined with her, except that (1), when the action concerns her separate property, she may sue alone; (2) when the action is between herself and her husband, she may sue, or be sued alone; and in no case need she prosecute, or defend, by a guardian, or next friend."

[And (p. 55) by—"SEC. 148. If a person entitled to commence any action for the recovery of real property, or to make an entry or defence, founded on the title to real property, or to rents and services out of the same, be, at the time such title shall descend or accrue, either (1), within the age of twenty-one years, or (2) insane, or (3) imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, or (4) a married woman; then such person

may, notwithstanding the time of limitation prescribed in this title be expired, commence his action, or make his entry, within three years next after full age, coming of sound mind, enlargement out of prison or discovery; and at no time thereafter."

[And (Id.) by—"SEC. 149. When two or more disabilities shall co-exist, or when one disability shall supervene an existing one, the period prescribed, within which an action may be brought, shall not begin to run until the termination of the latest disability."

[And (p. 62) by—"SEC. 163. If a person entitled to bring an action mentioned in the last chapter [*i.e.*, personal action], except for a penalty, or forfeiture, or against a sheriff, or other officer, for an escape, be, at the time the cause of action accrued, either (1), within the age of twenty-one years; or (2) insane; or (3) imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or (4) a married woman; then such person may bring his action within the times before limited, after the disability shall be removed."

[In *Lippard v. Troutman* (1875), 72 N. C. 551, and *Briggs v. Smith* (1880), 83 Id. 306, coverture was recognized as still affording protection, and the power of suing as a privilege, of which a failure to exercise was not to operate to the prejudice of the married woman. Her rights would be saved by the sections cited above.

[Upon the right of the wife to sue her husband, the case of *Manning v. Manning* (1878), 79 N. C. 293, is interesting. It was a demurrer to an ejectment by the wife, brought for the recovery from her husband, of real estate which she had been seized of in fee at the time of her marriage in 1873. The Constitution of the State, adopted in 1868, declares—Art. 10. "SEC. 6. The real and personal prop-

erty of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." The action was sustained because the wife was entitled "to be let into the possession, and to damages against her husband for appropriating to his own use, against her consent, the rents and profits." *BYNUM, J.*, Id. 298. But the husband's right of ingress and regress into her dwelling upon the land, and to live there with her, was also recognized, as the law was not designed to indirectly create a legal separation, and "the possession of the husband is not like that of a stranger, adverse to the wife, but in law consists with it." Id. 299.

[Ohio Revised Statutes (ed. 1889, vol. 1, p. 1257, as amended by Act of March 20, 1884), provide that—"SEC. 4996. A married woman shall sue, and be sued, as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of, or against, both her and her husband." And (Id. 1341, Id.)—"SEC. 5319. When a married woman sues, or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions to heads of families."

[There was no necessity of a suit imposed upon the wife, until the Amendment Act of April 14, 1886 (Laws, p. 74), struck out the words "a married woman," from §§ 4978 and 4986 (which were the saving clauses of the

Statute of Limitations); perhaps, her husband might command her not to sue: "She ought to have the right to sue after his influence, power, and command are no longer felt:" *ATHERTON, J. Ashley v. Rockwell* (1885), 43 Ohio State 386, 388. Hence, the Court sustained an action for slander, though the period of limitation had expired. The wife was still *covert*.

[Oregon Code of Civil Procedure (as amended by Act of October 21, 1876, Laws, p. 73), provides—"SECT. 30. When a married woman is a party, her husband shall be joined with her, except that,—1. When the action affects her separate property, or when the cause of action is for a wrong committed against her person or character, or is for wages due for her personal services, she may sue, or be sued, alone. 2. When the action is between herself and her husband, she may sue, or be sued, alone, and, in no case, need she prosecute or defend by a guardian or next friend."

[By an Act of October 21, 1880 (Laws, p. 7), "to establish and protect the rights of married women. SECT. 1. All laws, which impose, or recognize, civil disabilities upon a wife, which are not imposed, or recognized as existing as to the husband, are hereby repealed: *Provided*, that this Act shall not confer the right to vote, or hold office, upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property, or natural rights, she shall have the same right to appeal, in her own name alone, to the courts of law or equity, for redress that her husband has." This statute received a literal interpretation in *Barrell v. Tilton* (1886), 119 U. S. 637, where a joint action against husband and wife, in joint possession of land, was sustained.

[The present Statute of Pennsylvania has already been quoted on page 748, *supra*.

[In *Reilley v. Reilley* (1872), 4 Brews. (Pa.) 169, and *Rohrman v. Rohrman* (1878), 12 Phila. 390 an attachment was sustained on the part of the wife against the husband's property, when deserted by him, although he was not a seafaring man and she had not been declared a *feme sole* trader. The attachment was issued in the name of the wife, under the second section of the Act of May 4, 1855 (P. L. 430)—“That whenever any husband, from drunkenness, profligacy, or other cause, shall neglect, or refuse, to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader, under the Act of February 22, 1718 * * * .” The Act of 1718 (1 Sm. L. 99) provided “That where any mariners, or others, are gone, or hereafter shall go, to sea, leaving their wives at shop-keeping, or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and are hereby declared to be *feme sole* traders, and shall have ability, and are by this Act enabled, to sue and be sued, plead and be impleaded at law, in any court or courts of this province, during their husbands' natural lives, without naming their husbands in such suits, pleas or actions; * * * .”

[This is true in many States, but is not developed in this annotation, as it lies outside of the special point treated.

[In *Williams's Appeal* (1864), 47 Pa. 307, AGNEW, J., said: “Here is a judgment, admitted to be unobjectionable in point of honesty, given by a husband to secure his wife's separate estate. We are asked, in a question of mere distribution [of the proceeds of a sheriff's sale of the husband's property], to pronounce it void, upon the legal fiction that they are one in law. The proposition is shocking to any but the mind of a black-letter lawyer, and is to be denied, if it can be resisted upon any proper

legal principle. Unless we must, why should we go back to a period when legal logic, like that of the schools, was so metaphysical that rights were subservient to technicality, and substance to form? We should rather keep pace, if we can, with the progress of custom and legislation. Centuries were consumed in the slow process of parturition, giving birth to the benign features of the Act of 1848, securing the separate estate of married women.” The judgment was held to be valid.

In *re Marvin* (1872), 10 Phila. 524, it was ruled that an execution issued by a wife on a judgment confessed by her husband directly to her, without the intervention of a trustee, will be set aside at the instance of another execution creditor. This was in the Common Pleas of Philadelphia county. The Supreme Court, however, sustained such an execution in *Rose et ux. v. Latshaw* (1879), 90 Pa. 238, the principles of which decision also ruled *Lahr's Appeal* (1879), Id. 507. TRUNKY, J., said, in deciding the former case—

[“We have taken no account of the forboded ills to follow a decision that a wife's execution on a judgment against her husband, is not a nullity. The Commonwealth is none the worse for the advanced legislation for security of married women, in the ownership and enjoyment of their property, and will not be hurt if they are allowed process for collecting money honestly their due. An insolvent debtor may exhaust his means, in payment of a favored creditor, or he may confess judgment to that creditor, and all his property be seized in satisfaction thereof. This has long been the law, and now that the statute secures the wife her separate estate, when the husband owes her, he may rightly give her the preference. If fraud be alleged, the requisite proof to establish it, is no stronger, when the preference is given to a wife, than if to

a stranger and far greater strictness in proof is imposed in a wife, to make out her claim, than upon others": Id. 240.

[In *Kincade v. Cunningham* (1888), 118 Pa. 501, judgment was confessed by a man to a woman, on a bond, given in consideration of a contract to marry. They afterwards married, and a *sci. fa.* to revive the judgment was subsequently issued. Coverture and the want of a trustee for the plaintiff were not allowed to be set up as a defense to the judgment on the *scire facias*. "The question is not now one of the right of the wife to collect the judgment by execution against her husband's consent, but of her right to preserve her security": WILLIAMS, J., Id. 507. This case came before the Court a second time upon the question of the wife's right to issue execution on the judgment and levy on her husband's property, against his protest, and it was held that she had such right: *Kincade v. Cunningham* (1888), 1 Mona. (Pa.) 11.

[These cases are cited merely upon the right of the wife to sustain legal proceedings directly against her husband, at law and without the intervention of a trustee or next friend.

[By Act of March 27, 1713 (1 Smith's Laws, 76), as amended by § 27 of Act of July 30, 1842 (P. L. 456)—"§ 3. That if any person, or persons, who is, or shall be, entitled to any such action of trespass, detinue, trover, replevin, actions of account, debt, actions for trespass, for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, or at the time of any cause of such action given or accrued, fallen, or come, shall be within the age of twenty-one years, *feme covert*, *non compos mentis* [or] imprisoned, that then such person, or persons, shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their coming to, or being of, full age,

discovery, of sound memory [or] at large as other persons."

[By Act of March 26, 1785 (2 Smith's Laws, 300), as amended by § 1 of Act of March 11, 1815 (6 Smith's Laws, 277)—"SEC. 4. That if any person, or persons, having such right or title, be or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, [or] imprisoned, then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, as he, she, or they, might have done before the passing of this Act, so as such person or persons, or the heir or heirs of such person or persons, shall, within ten years next after attaining full age, discovery, soundness of mind, or enlargement out of prison, take benefit of or sue for the same, and no time after the said ten years. And in case such person or persons shall die within the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons, shall have the same benefit that such person or persons could or might have had by living until the disabilities should have ceased, or been removed. And if any abatement happen in any proceeding or proceedings upon such right or title, such proceeding or proceedings may be renewed and continued, within three years from the time of such abatement, but not afterwards."

[By Act of April 22, 1856 (P. L. 532)—"SEC. 1. No exception in any Act of Assembly respecting the limitation of actions in favor of persons *non compos mentis*, imprisoned, *femes covert*, or minors, shall extend so as to permit any person to maintain any action for the recovery of any lands or tenements, after thirty years shall have elapsed since the right of entry thereto accrued, to any

person within the exceptions aforesaid: *Provided*, That all persons who now have rights unbarred, and who would be sooner barred by this section, shall not be thereby barred for five years from the date hereof."

In *Kutz's Appeal* (1861), 40 Pa. 90, a married woman, in 1845, lent to a partnership, of which her husband was a member, money from her separate estate, for which she received a note payable in one year with interest. In 1857, the firm made an assignment. Before the auditor, the claim was presented but the creditors objected, alleging that it was barred by the Statute of Limitations. The claim was allowed, but the exceptions filed were sustained and the case was taken to the Supreme Court, which reversed the decree of the lower court. STRONG, J.: "In *Towers v. Hagner* (1837), 3 Whart. Pa. 48, it was ruled that when a wife lends the income of her separate estate to her husband, the Statute of Limitations does not begin to run against her claim until the death of her husband. The reason given was, that until then she cannot sue. The debt exists, but the remedy is suspended. * * * The wife was permitted to receive her property and to lend it, the husband himself becoming the borrower. It is not for him, therefore to object that the money was not hers, nor for the creditors claiming through him." A similar ruling was in *Marsteller v. Marsteller* (1880), 93 Pa. 350, where suit was brought by the administrators of a married woman against her husband for money loaned.

The Act of April 11, 1856 (P. L. 315), provides—"§ 3. Whensoever any husband shall have deserted or separated himself from his wife, or neglected or refused to support her, or she shall have been divorced from his bed and board, it shall be lawful for her to protect her reputation, by an action for slander or libel; and she shall also have the right,

by action, to recover her separate earnings or property: *Provided*, That if her husband be the defendant, the action shall be in the name of a next friend."

In *Miller v. Miller* (1863), 14 Pa. 170, an action of covenant was brought by a married woman, by her next friend, against her husband, for permitting waste on property conveyed to him for life by an ante-nuptial contract. The question arose as to the power of the court to sustain the suit. The lower court, in a learned opinion which was affirmed by the Supreme Court, said:—"It is a well settled principle of the common law that no suit will lie between husband and wife. To every action there must be parties and they are both treated as one, a man might as well be permitted to sue himself. It is otherwise in equity. A husband may sustain a bill against his wife in a Court of Chancery, or a wife against her husband. This difference in the power of the courts to sustain such proceedings, arises from two causes. The Courts of Chancery adopted the principles of the civil law for their guidance, in their early organization, and under that law, husband and wife could contract with each other as if *sole*, could sue each other to obtain their rights or enforce their contracts, and hold their property in severalty for every purpose. And the practice in equity has always been to look to the substance of the right, and bring in all parties, without regard to form. In Pennsylvania, our courts have adopted the common law forms of action, although affecting to give relief on equitable principles. It has never been pretended that a husband could sue his wife, or a wife her husband in this State, unless authority to do so by an Act of Assembly. The only question is, can they sue each other by virtue of any statute? Can the suit be sustained under the third section of the Act of April 11, 1856? * * * Three cases are provided

for—she may sue to protect her reputation, and to recover her separate earnings or property. * * * As we conceive, the statute was intended to enable her to sue for the recovery of her earnings, and also for her effects, if carried off, either by her husband or others. She might have such a property in a bond or promissory note as would enable her to maintain an action, but unliquidated damages are not property, either in common parlance or technical language. If the act had intended to give the wife a general power to sue, as a *feme sole*, it would have said so. * * * *Expressio unius exclusio est alterius*, is a sound legal maxim. This may, to a certain extent, be treated as a remedial statute, and therefore entitled to a liberal construction, but as it countervails a great common law principle, which makes the husband and wife one, and overturns a salutary rule of public policy, which prohibits and discourages all litigation between husband and wife, it should be strictly construed, and not extended beyond the letter. * * * I am therefore of the opinion that this suit for the recovery of damages on account of a covenant broken, is not authorized by the Act of Assembly."

[The Public Statutes of Rhode Island, (chap. 166, ed. 1882, pp. 424, 423), provide—"SECT. 16. In all actions relating to the property of any married woman, secured to her by this chapter, the husband and wife shall jointly sue and be sued, except in case a trustee of the same be appointed as hereinafter provided, and except in actions upon such contracts as she is authorized to make by section six of this chapter, in which last case the wife may sue and be sued alone." Section 6 is as follows: "Any married woman may sell and convey any of her personal estate other than that described in the preceding section, in the same manner as if she were single and unmarried, and may

make contracts respecting the sale and conveyance thereof, with the same effect and with the same rights, remedies and liabilities, as if such contracts had been made before marriage, but nothing in this section shall be so construed as to authorize any married woman to transact business as a trader."

[The Code of Civil Procedure of South Carolina (ed. 1888, p. 93), requires—"SECT. 135. When a married woman is a party, her husband must be joined with her, except that—1. When the action concerns her separate property, she may sue, or be sued, alone; *Provided*, That neither her husband, nor his property, shall be liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate, in the same manner as if she were *sole*. 2. When the action is between herself and her husband, she may sue, or be sued, alone; and in no case need she prosecute, or defend, by a guardian or next friend."

[Under this provision, a wife may file a complaint against her husband for support and maintenance, as a distinct cause of relief: *Christopher v. Christopher* (1882), 18 S. C. 600.

[A married woman is not included amongst those under disabilities, who are excepted out of the periods of limitation: Code of Civil Procedure (ed. 1888, pp. 81, 87), §§ 108, 122.

[In Texas, "under our system of marital law, as regulated by the constitution and statutes, and as expounded from time to time by this Court, the wife can, in a proper case, for the protection of her separate rights, maintain a suit in her own name, against her husband. * * * We also believe that she would be entitled, in a proper case, to the benefit of writs of attachment, sequestration, injunction, or any like writ, to which any other creditor would be entitled, in order to protect and preserve

his rights. Of course, writs of this character, between husband and wife, ought not to be encouraged, and ought, in every instance, to be scrutinized very closely indeed, by the courts, and every effort made to prevent fraud and collusion between them, to the prejudice of the rights of creditors, or third parties." WEST, A. J., *Ryan v. Ryan* (1884), 61 Texas, 474. This was an action of debt by the wife against her husband, into which certain creditors of the husband intervened. The court below erred in giving a binding instruction that the wife could not acquire rights paramount to the creditors of the husband, by issuing an attachment in her suit, against the community property.

[By the Revised Civil Statutes of Texas (ed. 1888, Vol. I, p. 412)—"ART. 1204. The husband may sue, either alone, or jointly with his wife, for the recovery of any separate property of the wife, and in case he fail or neglect so to do, she may, by the authority of the court, sue for such property in her own name."

In *Nickerson v. Matson* (1886), 65 Tex. 281, it was decided that where a suit was brought by a married woman against her husband and another, for false imprisonment, it could not be sustained as to the husband. The Court, in a lengthy opinion, maintained and approved the doctrine in *Longendyke v. Longendyke* (1863), 44 Barb. (N.Y.) 366.

[By Revised Civil Stat. (ed. 1888, pp. 114, 120)—"ART. 3201. If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be, at the time such title shall first descend, or the adverse possession commence—1. Under the age of twenty-one years; or, 2. A married woman; or, 3. Of unsound mind; or, 4. A person imprisoned; the time during which such disability shall continue shall not be deemed any portion of the time limited for the com-

mencement of such suit, or the making of such defense; and such person shall have the same time, after the removal of his disability, that is allowed to others by the provisions of this chapter." And "ART. 3222. If a person entitled to bring any action other than those mentioned in chapter one of this title [*i.e.*, actions for land], be, at the time the cause of action accrues, either—1. Under the age of twenty-one years; 2. A married woman; 3. Of unsound mind; 4. A person imprisoned; the time of such disability shall not be deemed a portion of the time limited for the commencement of the action, and such person shall have the same time, after the removal of his disability, that is allowed to others by the provisions of this title."

[The disability of a married woman, under this limitation law, is not such as to save a right of action involving the homestead, or community property; in such a case, she could maintain an action during coverture. "The Legislature might well have provided, that, when the husband attempts the alienation of the homestead, without the consent of the wife, the statute should not run against her as long as she lives. But, in our opinion, they have not done this:" GAINES, A. J., *Hussey v. Moser* (1888), 70 Texas 42, 46. However, the right of a wife to protect community property which is exempt from execution, is within the statute, and her disability will extend the time for commencing an action: *Alsup et al. v. Jordan* (1887), 69 Texas 300, 304.

[Utah (Compiled Laws, 1876, Tit. XVI., Ch. 1, p. 342) enacts that—"SEC. 2. Either spouse may sue or be sued, plead and be pleaded, or defend and be defended at law."

[And (under Tit. XI, Ch. 1, p. 506) —"SEC. 379. A husband shall not be a witness for, or against, his wife, nor a wife a witness for, or against, her husband; nor can either, during the mar-

riage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other."

[*Howe et al. v. Blandin et al.* (1849), 21 Vt. 315, decided that the proceedings to compel partition of real estate between tenants in common, under the statute of this State, was an adversary proceeding, and could only be sustained between those, who could be suitors, in respect to each other, in the common law courts. A husband and wife who were tenants in common of real estate, could not constitute adverse parties in such a proceeding; and if the county court sustained a petition where the only parties were husband and wife, and the object was to procure a division of land held by them in common, the judgment ordering the partition, must be treated as a nullity and the whole proceeding held *coram non iudice*.

[The Revised Statutes of Vermont (ed. 1880, Tit. 16, chap. 122), as amended by Act of November 26, 1884 (Laws, p. 120), provide—"SEC. 2321. A married woman may make contracts with any person other than her husband, and bind herself and her separate property, in the same manner as if she were unmarried, and may sue and be sued as to all such contracts made by her, either before or during coverture, without her husband being joined in the action as plaintiff or defendant, and execution may issue against her, and be levied on her sole and separate goods, chattels, and estate. But this section shall be subject to the limitation, that nothing herein contained shall authorize a married woman to convey, or mortgage, her real estate, except by deed duly executed by her and her husband, as now provided by law; and to the further limitation that nothing herein contained shall authorize a married

woman to become surety for her husband's debts, except by way of mortgage duly executed, as now provided by law."

[*Ellsworth v. Hopkins*, decided by the Supreme Court of Vermont, August 11, 1886, was a case in which the Court ruled that a promissory note executed by a husband to his wife was void, and no action could be maintained thereon, not even by a third party, endorsee; POWERS, J., saying: "As between Hopkins and his wife, the note was null and void. They were, at law, incapable of contracting with each other, and contracts assumed to be made between them, were not merely voidable, but absolutely without obligation or force. * * * There is nothing to show that this note was the separate statutory or equitable estate of Mrs. Hopkins. Had such facts appeared, the note might have represented an enforceable equitable obligation which equity would protect." So, also, *Sweat v. Hall* (1836), 8 Vt. 187, to the same effect.

[Virginia, under Code of 1887 (Tit. 28, Ch. 103, p. 567), provides—"SEC. 2284. All real and personal estate, to which any woman hereafter marrying, is entitled at the time of her marriage, or which any married woman may hereafter acquire or become entitled to, during coverture, by gift, grant, purchase, descent, devise, bequest, or in any other manner whatever, and the rents, issues, income, profits, and all increase thereof, shall be and continue her separate estate. The separate estate shall include rights of action, damages for a wrong, and compensation for property taken for public use, to which a woman is entitled at her marriage, or to which she becomes entitled during coverture. Nothing however in this, or any other section of this chapter, shall be construed as giving to a married woman a right to damages, or a right of action therefor against her husband for any in-

jury to her person or reputation committed by him before their marriage or during the coverture."

[And (p. 698)—"SEC. 2917. If, at the time at which the right of any person to make entry on, or bring an action to recover any land, shall have first accrued, such person shall be an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the said period mentioned in section twenty-nine hundred and fifteen shall have expired, make an entry on, or bring an action to recover such land, within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened. This section shall not apply to a married woman having the right to make an entry on, or bring an action to recover land, which is her separate estate."

[And (p. 702)—"SEC. 2931. If any person, to whom the right accrues to bring any such personal action, or *scire facias*, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant, married woman, or insane, the same may be brought within the like number of years after his becoming of full age, unmarried, or sane, that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgement as aforesaid, except that it shall, in no case, be brought after twenty years from the time when the right accrued. This section shall not apply to a married woman to whom the right accrues to bring any such action, or *scire facias*, or such bill to repeal a grant, relating to or affecting her separate estate."

[Washington, (Code of 1881, Ch. 183, p. 413), provides—"SEC. 2396.

Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried."

[And (p. 413)—"SEC. 2398. All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights, she shall have the same right to appeal, in her own name, to the courts of law or equity, for redress and protection, that the husband has: *Provided always*, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."

[And (p. 414)—"SEC. 2401. Should either husband, or wife, obtain possession, or control, of property belonging to the other, either before, or after, marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner, and to the same extent, as if they were unmarried."

[By the same Code of Civil procedure (Code of 1881, Ch. 1, p. 35)—"SEC. 6. When a married woman is a party, her husband must be joined with her, except: 1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. 2. When the action is between herself and her husband she may sue or be sued alone. 3. When she is living separate and apart from her husband, she may sue or be sued alone."

[West Virginia provides by Code of 1887 (Ch. 66, p. 606)—"12. A married woman may sue and be sued without joining her husband in the following cases: 1. Where the action concerns her separate property. 2. When the action is between herself and her hus-

band. 3. When she is living separate and apart from her husband. And in no case need she prosecute or defend by guardian or next friend."

[And, by (Ch. 104, p. 710)—"3. If, at the time at which the right of any person to make an entry on, or bring an action to recover, any land, shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the said period of ten years shall have expired (except in the case of a married woman, where such land is her sole and separate property), make an entry on, or bring an action to recover, such land, within five years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same accrued, or shall have died, whichever shall first have happened.

(And, by (Chap. 104, p. 713)—"16. If any person, to whom the right accrues to bring any such personal action, suit, or *scire facias*, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant, married woman, or insane, the same (except in the case of the married woman, as provided in section 3 [*supra*] of this chapter), may be brought within the like number of years after his becoming of full age, unmarried or sane, that is allowed to a person, having no such impediment to bring the same after the right accrues, or after such acknowledgment as aforesaid, except that it shall in no case be brought after twenty years from the time when the right accrued."

In *Roseberry v. Roseberry* (1886), 27 W. Va. 759, an action of debt was brought by a married woman against her husband, on notes executed by defendant in favor of plaintiff. The action was dismissed, since the common law is in full force and vigor in West Vir-

ginia, as to the power of a married woman to contract with her husband. And see *Crowther v. Crowther* (1868), 55 Me. 358; *Smith v. Gorman* (1856), 41 Id. 408; *Jackson v. Parks* (1852), 10 Cush. (Mass.) 550; *Ingham v. White* (1862), 4 Allen (Mass.) 412; *Carey & Co. v. Burruss & Pitzer* (1882), 20 W. Va. 571.

[Wisconsin (Annotated Stat. 1889, Ch. 108, p. 1358) enacts—"SEC. 2345. Every married woman may sue in her own name, and shall have all the remedies of an unmarried woman, in regard to her separate property or business, and to recover the earnings secured to her by the two next preceding sections, and shall be liable to be sued in respect to her separate property or business, and judgment may be rendered against her and be enforced against her and her separate property, in all respects as if she were unmarried. And any married woman may bring and maintain an action in her own name for any injury to her person or character, the same as if she were *sole*, and any judgment recovered in such action shall be the separate property and estate of such married woman, *provided* that nothing herein contained shall affect the right of the husband to maintain a separate action for any such injuries as now provided by law."

[By the same Stat. (Tit. 25, Ch. 118, p. 1486)—"Sec. 2608. When a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property or business, or alleged antenuptial debts, or is between herself and her husband, she may sue and be sued alone."

[In *Beard v. Dedolph* (1871), 29 Wis. 140, DRXON, C. J., said: "With respect to her separate property, the statute has placed her upon the same footing as to all the world, her husband included, as if this were her condition—as if she were, in the words of the Act,

‘a single female.’” In this case, the husband transferred to his wife, the note in suit, before maturity, and the case relates only to the validity of the transfer. But it was the foundation for the next cited case.

In *Carney v. Gleissner, et al.* (1885), 62 Wis. 494, the question arose in an action of replevin, as to the right of a man to recover from his wife certain property held by her.

CASSODAY, J.: “It is urged the wife should not be made a party defendant, because the husband cannot maintain an action against his wife. This certainly would be the law on the old theory of the marital relation. Whether it is now, must depend upon statute. It is the law that every married woman may sue in her own name, and has all the remedies of an unmarried woman, in regard to her separate property or business: R. S., § 2345. The statute entirely removes the disabilities of coverture. As to her separate property, or in contests over what she claims to be her separate property, there can be no doubt under this statute but what she can sue her husband at law or in equity;” citing *Moore v. Moore* (1872), 47 N. Y. 467; *Southwick v. Southwick* (1872), 49 Id. 510; *Wright v. Wright* (1873), 54 Id. 437; *Berdell v. Parkhurst* (1879), 19 Hun (N. Y.) 358; *Wood v. Wood* (1881), 83 N. Y. 575.

[Wyoming (Rev. Stat. 1887, Tit. 28, Ch. 2, p. 417) provides—“SEC. 1560. Any woman may, while married, sue and be sued in all matters having relation to her property, person, or reputation, in the same manner as if she were

sole.” And under the Code of Civil Procedure (Id., Tit. 38, Ch. 3, p. 559)—“SEC. 2385. Hereafter, in any civil action, suit or proceeding, whenever any married woman is a party, it shall not be necessary to join her husband with her as a party, except in such cases where it would be necessary to join such husband without reference to the fact of his marriage to such woman.”

There are reasons for construing statutes as against authorizing actions for tort between husband and wife, which do not exist in respect to actions relating to contracts. Before the statutes, the damages arising from injuries to the person or character of the wife, were to be sued for by the husband and wife, and when recovered, belonged to the husband, and these statutes were evidently intended to change the law only to allow the wife to sue for and recover for herself in all matters pertaining to her separate property. Were actions for tort to be sustained by the wife against her husband under statute law, there would be a lack of mutuality of remedy.

[Note should be made that this annotation relates solely to the power of a wife to sue her husband, alone and without any trustee or other third person, at law and not in equity, and under ordinary circumstances and not in cases of desertion or other special statutory power. The subject is so extensive and yet so important as to demand this minute treatment. The other causes of suit will be treated in the future.—ED.]

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